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No. 1069

In the

Supreme Court of the United States

OCTOBER TERM, 1968

FEDERAL-BRYANT MACHINERY COMPANY,
a corporation, etc.,

Appellant,

vs.

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the Supreme Court of Illinois (App. A, pp. 1a-6a below) is reported at 41 Ill. 2d 64, 241 N.E. 2d 857 (1968).

Jurisdiction

This action was brought by the appellant under the Illinois Administrative Review Act (Ill. Rev. Stats. [1959], ch. 110, §§ 264 *et seq.*) to review administrative determinations by the appellee under the Illinois Retail-

er's Occupation Tax Act, as amended (Ill. Rev. Stats. [1953], ch. 120, §§ 440 *et seq.*), which held appellant liable for Retailer's Occupation Tax on certain transaction in interstate commerce.

The judgment of the Supreme Court of Illinois was entered on September 24, 1968. A petition for rehearing was denied on November 21, 1968, and the mandate was issued on December 2, 1968 (App. B, p. 6a-7a below). The notice of appeal was filed in the Supreme Court of Illinois on January 28, 1969.

Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. §§ 1257(2) and 2101(c). The following cases sustain the jurisdiction of this Court: *Gwin, White & Prince* v. *Henneford,* 305 U.S. 434; *Adams Mfg. Co.* v. *Storen,* 304 U.S. 307.

The statute involved, the Illinois Retailers' Occupation Tax Act (Ill. Rev. Stats. [1953], ch. 120, §§ 440 *et seq.*), is in pertinent part set out verbatim in Appendix C, (pp. 8a-17a below).

Question Presented

The question presented by this appeal is whether it violates the commerce clause of the United States Constitution for a state to impose an occupational privilege tax measured by the gross sales price of specially produced machinery sold by a local representative for several out-of-state machinery builders, where: (1) each machine is built only upon the special order, and to the particular specifications, of a local industrial user; (2) the machine required so to be built to do the job for which it is ordered is obtainable only from a builder whose plant is outside the state; (3) neither the out-of-

state builder nor the local representative maintains an inventory of machines either within the taxing state or elsewhere; and (4) when completed, the machine is shipped directly from the builder to the user, f.o.b. the builder's plant outside the state.

Statement Of The Case

1. *The Illinois Retailer's Occupation Tax Act*

The Illinois Retailer's Occupation Tax Act, Ill. Rev. Stats. (1953), ch. 120, §§ 440, *et seq.*, as in force during the period in question, imposed a tax on "persons engaged in the business of selling tangible personal property at retail" measured by "the gross receipts from such sales of tangible personal property made in the course of such business". Ill. Rev. Stats. (1953) ch. 120, § 441. Appellant, an Illinois corporation, was held by the court below to be "engaged in the business of selling tangible personal property at retail", with respect to the transactions in question. Rejecting appellants contention that, as applied to such transactions, the statute was an unconstitutional burden on interstate commerce, the Supreme Court of Illinois upheld the constitutionality of the statute and its application.

2. *The Facts*

During the period in question, appellant was the exclusive representative in specified territories (including parts of Illinois) for various builders of machine tools (which are power-operated metal working machines, not portable by hand [R. 65]* and which are hereinafter

* References are to the pages of the original trial court record certified from the Supreme Court of Illinois in a separate volume and indexed as item no. 12.

referred to as "machines"). The transactions in question involved sales of machines manufactured by builders whose plants were located exclusively outside the State of Illinois, who maintained no offices in Illinois, who maintained no offices in Illinois and who maintained no inventory of machines in Illinois. (R. 75-77).

Appellant's salesmen would call on a prospective customer and solicit an inquiry concerning a machine needed. (R. 81). If the prospect was interested, appellant would submit a proposal offering a particular machine to be built to the customer's particular specifications by a specified builder. (R. 117-119; See T.P. Ex. 22). If the prospect determined to purchase the machine, it would submit to the builder, care of appellant, a purchase order which provided that it was not to be binding on either party until accepted by the builder at the builder's office, which was located outside Illinois. (R. 124; T.P. Ex. 22A-B). Upon receipt by appellant of the customer's order, it was checked against the proposal, copied, recorded and forwarded to the builder. (R. 121). The builder would check the order for wording and price, determine if the machine could be completed within the time specified in the order, and check the customer's credit. (R. 199-201). If satisfied, the builder would sign an acceptance of the purchase order and return the accepted copy to appellant. When the machine was completed, the builder would ship it directly to the Illinois customer f.o.b. the builder's plant (E.g., T.P. Ex. 22A-B) and send appellant an invoice which showed that the machine was purchased from the out-of-state builder by the Illinois customer. (E.g., T.P. Ex. 22F). Appellant would then bill the customer, also showing the sale to be by the builder to the customer. In some cases, the customer's remittance in payment for the machine would

be payable to the builder, in which case it would be forwarded to the builder, and the builder would pay taxpayer its commission. In other cases the customer's remittance would be payable to the appellant, in which case appellant would deduct its agreed-upon commission and remit the net amount due to the builder. (R. 205).

The machines involved in the transactions in question were in each case built to order to meet the particular customer's specifications (R. 79-80) and to do a particular job. Each machine sold differed from nearly every other one sold, there being as many as 100 different variations of any one machine. (R. 79-81; R. 151-154). Consequently, neither the appellant nor the builder maintained any inventory of finished machines in Illinois or elsewhere. (R. 66-7; R. 78-9).

The price of the machine to the user was fixed by the builder; and the appellant had no authority to quote or bill any different price. (R. 77-8). Once the customer determined to submit an order, the customer dealt exclusively with the builder, and its only dealings with the appellant were in submitting its purchase order care of appellant and in paying the bill. (R. 364-5).

3. *The Proceedings Below*

A hearing referee of appellee found that the transactions in question were, notwithstanding their form, sales by the out-of-state builders to appellant for resale by it to Illinois users. (R. 400). The hearing referee's recommendations based on that finding were adopted by appellee, which assessed a tax despite appellant's argument before the referee that application of the tax to the transactions in question violated the commerce clause. (R. 390-92)

Appellant instituted these proceedings for judicial review of that administrative decision, and in paragraph 13 of its complaint (R. C3 to C7 at R. C6) expressly asserted as a ground for reversal that if the transactions in question were held to be retail sales by appellant, imposition of the tax thereon was unconstitutional under the commerce clause of the United States. The trial court denied the relief prayed for and affirmed appellee's administrative determination of taxability.

On appeal, the Supreme Court of Illinois, after holding the transactions in question to be sales by appellant at retail, specifically considered (App. A., p. 5a below) appellant's claim under the commerce clause:

> "The plaintiff contends that even if, as we have held, the transactions were sales by the manufacturer to the plaintiff and resales by the plaintiff to the consumers, imposition of the tax is nevertheless barred by the commerce clause of the Constitution of the United States."

The Court below rejected appellant's contentions and affirmed, sustaining the constitutionality of the taxing statute and its application to appellant's business.

The Question Is Substantial

This appeal presents squarely, for the first time in this Court, the question whether a state may constitutionally impose an occupational privilege tax on the gross receipts from sales by a local independent representative for out-of-state manufacturers of machinery which is produced out-of-state only pursuant to special order from, and to meet the particular specifications of, a local customer, and which is shipped by the manufacturer directly to the local customer f.o.b. the manufacturer's out-of-state plant.

The decision below goes beyond any decision of this Court sustaining the imposition of a gross receipts tax on sales of goods having an out-of-state source, is inconsistent with the decision of this Court in *Gwin, White & Prince* v. *Henneford,* 305 U.S. 434, is contrary to the only other decision which considers the Constitutional distinction between standard, stock items and goods produced to special order, *National Cash Register Co.* v. *Taylor,* 276 N.Y. 208, 11 N.E. 2d 881 (1937) *cert. den.* 303 U.S. 656, and was based on a mistaken interpretation of the decisions of this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33, and in *McGoldrick* v. *Felt & Tarrant Mfg. Co.* and *McGoldrick* v. *A. H. DuGrenier, Inc.,* 309 U.S. 70.

The question presented affects an important segment of the national economy, and, while the impact of the decision below has been somewhat lessened by the growth of offsetting state use taxes, state and local sales taxes and occupational privilege taxes measured by sales or gross income still represent significant methods of state and local taxation. Numerous statements by this Court strongly suggest that a state may not tax sales of goods specially produced out-of-state to meet particular specifications for local use, particularly where shipment is made from and title passes to the user out-of-state, but it has not yet specifically so held. This appeal, therefore, presents a constitutional issue deserving plenary consideration.

1. No prior decision of this Court sanctions a sales tax, or occupational privilege tax measured by sales, on the manufacture and delivery out-of-state of goods produced only on special order to meet local customers' particular specifications, even where the seller has a place of business in the taxing state. *McGoldrick* v. *Berwind-*

White Coal Mining Co., 309 U.S. 33 and the companion cases of *McGoldrick* v. *Felt & Tarrant Mfg. Co.* and *McGoldrick* v. *A. H. DuGrenier, Inc.*, 309 U.S. 70 (relied on by the Court below) as well as *Wiloil Corp.* v. *Pennsylvania*, 294 U.S. 169 and *Graybar Electric Co.* v. *Curry*, 238 Ala. 116, 189 So. 186, affirmed *per curiam*, 308 U.S. 513 (cited by this Court in *Berwind-White*) all involved the marketing of standard products, not special-order production to meet customer specifications. In *Berwind-White* the goods were coal; in *Felt & Tarrant*, standard comptometers produced for and delivered from stock; in *DuGrenier*, standard vending machines produced for and delivered from stock; in *Wiloil*, fuel oil shipped in tank cars; in *Graybar*, standard electrical products such as light bulbs.

Moreover, in *Graybar* and *Wiloil*, as well as in *Banker Brothers* v. *Pennsylvania*, 222 U.S. 210, 214 (relied on in *Graybar*) and *Harvester Co.* v. *Dept. of Treasury*, 322 U.S. 340, 343 n. 3, special mention was made, in sustaining the tax, of the fact that shipment from a point outside the state was dictated solely by considerations of convenience to the seller (or, as in *Graybar*, by a desire for tax avoidance) and was of no commercial significance to the purchaser.

The principle of these cases is that the commerce clause does not insulate a sale by a local vendor from local taxation merely because interstate shipment of the goods sold is contemplated or required by the contract of sale, *if special out-of-state fabrication for the purchaser's particular use is not required.* Where, however, as here, the purchaser contracts for special production, by an out-of-state manufacturer selected by him, of non-existent goods to be fabricated to his particular specifi-

cations, the statements of this Court in those cases suggest strongly that the transaction is so intrinsically in interstate commerce as to be constitutionally protected from a local non-apportioned tax on gross receipts therefrom, especially where title passes to the purchaser in the state of shipment.

2. In the case at bar, appellant urged below that the legal effect of the dealings between the parties was a contract between the out-of-state manufacturer and the local user, with the appellant acting solely as a soliciting and billing agent. The Supreme Court of Illinois disagreed, holding the transactions to be, in effect, sales by the out-of-state manufacturer to appellant and immediate resales by it to the Illinois user. For purposes of this appeal the distinction is without significance. It is clear from the undisputed facts that appellant's role was essentially that of a broker. Its function, like that of any other manufacturer's representative in an industry where products are manufactured solely to specifications of sophisticated industrial purchasers, is to match the engineering and productive skills of the manufacturers it represents with the production needs of the customer. All the essential elements of the transaction (e.g., fabrication of the specially ordered product, questions of shipment, questions of warranties of performance) are between the customer and the manufacturer. Indeed, even prior to execution of the contract or contracts of sale, the appellant is essentially a conduit through which negotiations between the prospective manufacturer and prospective customer are conducted. Appellant's entire service is in aid of the consummation of a transaction in which the true parties in interest are the manufacturer and the customer; and where, as here, those parties

are located in different states, its entire service is in aid of an interstate transaction for production and shipment in interstate commerce.

Admittedly, appellant's services are rendered locally. Accordingly, if the tax in question were measured solely by the commissions retained by appellant as compensation for those services (as in *Washington-Oregon Shippers Cooperative Association, Inc.* v. *Schumacher,* 59 Wash. 2d 159, 367 P. 2d 112, *cert. den.* 370 U.S. 937) the tax would be fairly apportioned to those local activities and would be valid. Here, however, Illinois seeks to tax the local broker-seller, not merely on his commissions, but *on the gross proceeds of the transaction,* the bulk of which is represented by the price charged by the manufacturer for its productive services rendered out-of-state, where title passes. Such an unapportioned gross receipts tax on the privilege of engaging in the business of rendering services in aid of interstate commerce, measured by gross receipts attributable to activities in such commerce rendered beyond the limits of the taxing state, falls squarely within the prohibitory rationale of *Gwin, White & Prince* v. *Henneford,* 305 U.S. 434, 438-9, and *Adams Manufacturing Co.* v. *Storen,* 304 U.S. 307.

3. The decision below is contrary to the only other decision found which deals with the constitutional question here presented.

In *National Cash Register Co.* v. *Taylor,* 276 N.Y. 208, 11 N.E. 2d 881, *cert. den.* 303 U.S. 656, the seller's plant was located in Ohio, but it maintained a sales office and an inventory of "standard" machines in New York. Orders received for machines which deviated from the standard models were expressly made "subject to acceptance by the Company at Dayton, Ohio", were forwarded to Ohio;

and the finished machines, separately packaged and addressed to customer, were either shipped direct or, more often, shipped in carload lots to the New York office from which they are delivered to the customer. The Court of Appeals held the transactions protected by the Commerce Clause:

> "A tax imposed by the state on the sale of goods produced here and goods imported from other states is valid. However, the goods delivered under a 'special order' were not within the state when the order was given. The contract of sale did not become effective until the order given in New York was accepted in Ohio; the goods sold were manufactured in Ohio; they were appropriated to the contract of manufacture or sale in Ohio; they were never held here at the pleasure of the seller for disposal or use; they were sent to the office here of the seller only for delivery to the buyer and as a convenient step in the transportation from the factory of the seller outside the state to the buyer here.
>
> * * *
>
> "It is true that in the latter case [*Wiloil*] a tax by the state of Pennsylvania upon the sale of goods shipped to the buyer from outside the state was upheld. In that case the contract, which was made in Pennsylvania, called for delivery in Pennsylvania of unascertained goods, viz, fuel oil. To carry out the contract the seller could have delivered oil held by it or purchased from another in Pennsylvania. It preferred to obtain the oil in Delaware. Interstate transportation was made necessary *by reason of the seller's choice*; it was not required or contemplated by the contract, and, since the contract of sale did not require or contemplate interstate transportation, the court held that a tax on the sale is not a tax on interstate commerce. *Here, on the contrary, the contract made outside of the state called for the delivery of goods*

> *which were manufactured outside of the state and which could not be procured within the state. Interstate commerce was contemplated and required by the contract of sale. The state has no power to impose a tax upon that kind of transaction.*" (11 N.E. 2d at pp. 882-3; Emphasis added)

The Court below declined to follow *National Cash Register*, holding that since the New York Court of Appeals had based its decisions in *Berwind-White, Felt & Tarrant* and *DuGrenier* on *National Cash Register*, the reversal by this Court in the subsequent cases implied a complete rejection of *National Cash Register*. Appellant submits that the judgment of the Court below was based on a misinterpretation of this Court's holdings in *Berwind-White, Felt & Tarrant* and *DuGrenier*. Significantly, this Court denied certiorari in *National Cash Register* while granting it in the subsequent cases. Moreover, this Court made no mention of *National Cash Register* in the cases relied on below.

Concededly, the cases relied on below did away with the "contemplated or required by the contract" test where the sale is of standard goods imported into a state to seek a market; but there is no reason to interpret those cases as rejecting the holding of *National Cash Register* where the contractual requirement of interstate shipment is based on the commercial reality that the special-order production bargained for is available only at the out-of-state situs of the producer's plant. It is submitted that the question whether *National Cash Register* still states the law as applied to sales of goods specially produced out-of-state to meet particular specifications of local users, particularly where title passes out-of-state, deserves plenary consideration by this Court.

4. The question presented has significant economic importance. The Manufacturers' Agents National Association claims over 3,000 members; its official organ claims paid circulation in excess of 8,000; and it claims that over 25,000 manufacturers sell through independent agents. *The Agent And Representative*, vol. 20, No. 1, November, 1968. How many of these manufacturer's agents represent special order manufacturers of industrial goods is unknown, but according to a survey made in the fifties, 8% of the machine tool manufacturers surveyed made use of independent manufacturer's agents dealing directly with industrial users as the manufacturer's primary channel of distribution. Diamond, *Distribution Channels For Industrial Goods*, p. 63. Professor Diamond's survey also showed that the services of independent manufacturer's agents dealing directly with users were availed of primarily by smaller manufacturers, those with sales of $5 million or less. *Op. cit.*, p. 57. The burden of gross receipts taxes in the state of destination on special-order transactions negotiated by such representatives therefore falls heaviest on small producers. Nor has the advent of complementary use taxes rendered the question moot. At least three states, and many cities and counties have gross income taxes which apply to sales and which are unsupported by complementary use taxes. Beaman, *Paying Taxes To Other States* (1963), p. 12-2. Moreover many complementary use taxes have exemptions which do not apply to the taxing jurisdiction's gross insome or sales tax. *Ibid.* The applicability of sales or gross receipts taxes in the state of destination is still, therefore, an issue of current significance.

While reversal of the decision below will not affect the revenues of that large majority of the states which have use taxes, affirmance would permit those state and local taxing jurisdictions which do not have use taxes to tax

the gross receipts of interstate transactions which otherwise would clearly be beyond their constitutional reach, merely because an out-of-state manufacturer has utilized the services of a local independent representative. The decisions of this Court have extended to the states and their political subdivisions broad powers to compel out-of-state vendors to collect and remit use taxes. Those taxing jurisdictions which have chosen not to avail themselves of this opportunity ought not to be permitted, by indirection, to obtain the same results through extraterritorial extension of their occupational privilege taxes. Use taxes are levied on the consumer, and the vendor has both the right and duty to collect them. Occupational privilege taxes, on the other hand, are levied on the vendor, who may or may not be able to pass them on to the consumer, and therefore directly burden interstate commerce when not apportioned to local activity. *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 330-331, establishes that the nature and incidence of a tax has constitutional significance and that what is constitutionally allowed a state in imposing liability for collection of use taxes measured by interstate sales may be constitutionally prohibited where a direct tax on such sales is, as here, attempted.

CONCLUSION

The question presented by this appeal is substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SUPREME COURT OF ILLINOIS

Docket No. 41176—Agenda 66—May, 1968.

FEDERAL-BRYANT MACHINERY COMPANY, Appellant, *vs.* THE DEPARTMENT OF REVENUE, Appellee.

Mr. JUSTICE SCHAEFER delivered the opinion of the court:

The plaintiff, Federal-Bryant Machinery Company, appeals directly to this court from a judgment of the circuit court of Cook County in an action under the Administrative Review Act. (Ill. Rev. Stat. 1967, chap. 110, pars. 264-279.) The action was brought to review those aspects of an administrative determination of the Department of Revenue which were adverse to the plaintiff with respect to a deficiency assessment under the Retailers' Occupation Tax Act covering the period April 1, 1951, to August 31, 1954, inclusive.

The plaintiff is an Illinois corporation with offices in Chicago. It has been the exclusive representative, in specified territories, of various manufacturers of machine tools whose plants are located outside of Illinois, and who maintain no inventories in Illinois. Prior to November of 1946 the plaintiff had bought machine tools from the out-of-state manufacturers it represented, and had resold them to purchasers in Illinois.

On September 27, 1946, the Department issued a ruling with respect to the taxability of agents of "manufacturers of machine tools located outside of Illinois under contracts with such manufacturers which establish the relationship of principal and agent." That ruling set out certain suggested procedures, and stated that those procedures, if followed, would be considered to have established an agency relationship so that the transactions would not be subject to the Retailers' occupation tax. At the request of the plaintiff, its sales agency agreements with manufacturers were modified

by including the suggested provision that the plaintiff was to act only as soliciting agent for the manufacturer, without power to bind the manufacturer contractually, and that all orders would be forwarded to the manufacturer's home office for acceptance. The plaintiff also requested its customers to address their orders to the manufacturer, in care of the plaintiff, as agent, and to include on the face of each order a statement to the effect that "it shall not be binding upon either party until accepted" by the manufacturer at its home office outside of Illinois.

In 1957, after the Illinois Use Tax (Ill. Rev. Stat. 1957, chap. 120, pars. 439.1-439.22) had become effective, the manufacturers requested the plaintiff to return to the practice that had been followed prior to November of 1946. The plaintiff did so, and since 1957 the plaintiff has purchased machines from the manufacturers it represents, and then sold them to its own customers.

The 1946 ruling was revoked by the Department of Revenue, effective April 1, 1951. The new ruling which replaced it stated that exemption would no longer be permitted "simply because such dealers' method of doing business conforms to the agency requirements" set out in the 1946 ruling. After enumerating specific circumstances that the Department would take into account, the ruling concluded by stating that "any facts bearing on the question of the possible existence or non-existence of an alleged agency may be considered."

The sales involved in the case were made between April 1, 1951 and August 31, 1954, in the following manner: Plaintiff's salesmen would prepare and submit to an interested Illinois customer, a proposal offering a specific machine to be built by a particular manufacturer at a stated price. The customer would then prepare its own purchase order based on the proposal, address it to the manufacturer in care of plaintiff, and mail the order to the plaintiff, who checked the order for accuracy, copied it, and forwarded it to the manufacturer. When the machine was built the manufacturer shipped it directly to the Illinois customer,

f.o.b. the manufacturer's plant, and billed the plaintiff for the stated retail price, less commission. Plaintiff then billed the customer, who remitted to the plaintiff, usually by check payable to the plaintiff, but occasionally by check payable to the manufacturer. Plaintiff guaranteed the credit of each prospective purchaser whose order plaintiff forwarded to the out-of-state manufacturer, and if the purchaser did not pay, plaintiff was obligated to, and did, pay the purchase price, less commission, to the manufacturer.

The administrative hearing officer found that the transactions in question were sales to the plaintiff by the out-of-state manufacturers for resale by the plaintiff to the Illinois customers, and that the issues in this case were the same as those raised in *Marshall & Huschart Machinery Co.* v. *Department of Revenue* (1960), 18 Ill.2d 496. He also found that the plaintiff's operations were the normal operating procedures of a seller, and that the addressing of purchase orders to plaintiff as agent was fictitious and done for the purpose of avoiding taxation under the Department's 1946 ruling which had been revoked. The circuit court affirmed.

On this appeal the plaintiff argues that it was not engaged in the business of selling tangible personal property in this State, within the meaning of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1951, 1953, chap. 120, par. 441), and that "the transactions in question are exempt from Retailers' Occupation Tax under the 'commerce clause' of the Constitution of the United States."

The plaintiff says that during the period involved in this case it acted as a soliciting and billing agent for the out-of-state manufacturers of machine tools, and that during that period the machine tools were sold by the manufacturers directly to the Illinois consumers and not by the manufacturers to the plaintiff for resale. The situation in this case closely resembles that in *Marshall & Huschart Mach. Co.* v. *Dept. of Revenue* (1960), 18 Ill.2d 496; cert. den. 363 U.S. 820. The only significant difference between the two cases is that there the taxpayer purchased, from

the out-of-state manufacturers, the accounts receivable that were generated by the sales of the machine tools. The plaintiff contends that the absence of that element in this case is crucial since that factor led this court to find that what in form was a purchase of an account receivable was in substance no different than a purchase of goods for resale. We think that the contention is without merit. In the present case the plaintiff guaranteed payment to the manufacturers for the goods sold and in its practical effect the guarantee of payment does not differ from a purchase of the account receivable. In each situation the manufacturer is relieved of concern for the credit of the ultimate purchaser. Both procedures are inconsistent with the normal relationship between principal and soliciting agent.

The ordering and billing procedures employed in these transactions also support the hearing officer's finding that plaintiff was engaged in the business of selling at retail. After the plaintiff sent to the customer a proposal prepared from the standard price lists supplied by the manufacturer, the customer addressed its purchase order to the manufacturer in care of the plaintiff, and sent it to the plaintiff. The plaintiff then checked the purchase order against the proposal and mailed it to the manufacturer. After the manufacturer completed and shipped the machine to the customer, it billed the plaintiff, not the customer, for the full price of the machine, and it sent a credit memo to the plaintiff for the amount of its commission. The plaintiff then billed the customer, who remitted to the plaintiff, usually by a check made out to the plaintiff.

If no more than an agency was involved, it would not be necessary to route the purchase order through the plaintiff, nor would it be necessary that payment be made to the agent rather than the principal.

In the context of the plaintiff's method of doing business both before and after the period involved in this case, the plaintiff's continuing responsibility for payment to the manufacturers, and its complicated ordering and billing procedures justify the conclusion that in fact the plaintiff

purchased from the manufacturers and resold to its customers.

The plaintiff contends that even if, as we have held, the transactions in question were sales by the manufacturer to the plaintiff and resales by the plaintiff to the consumers, imposition of the tax is nevertheless barred by the commerce clause of the constitution of the United States. Its position is that where the only source of supply for goods sold is located outside of the State, the transaction is interstate by necessity rather than by choice, and that a tax measured by gross receipts is therefore invalid. The Court of Appeals of New York did indeed draw such a distinction in *National Cash Register Co.* v. *Taylor* (1937), 276 N.Y. 208, 11 N.E.2d 881, 883, cert. den. 303 U.S. 656, saying: "Here, on the contrary, the contract made outside of the state called for the delivery of goods which were manufactured outside of the state and which could not be procured within the state. Interstate commerce was contemplated and required by the contract of sale. The state has no power to impose a tax upon that kind of transaction."

That view was the underlying basis for the decisions of the New York courts which were reviewed in *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940), 309 U.S. 33, 84 L. Ed. 565, and in the companion cases of *McGoldrick* v. *Felt & Tarrant Mfg. Co.* and *McGoldick* [sic] v. *A. H. DuGrenier, Inc.*, 309 U.S. 70, 84 L. Ed. 584. In each of these cases the New York courts had held the tax invalid, relying upon the *National Cash Register* case. In each of these cases the Supreme Court of the United States reversed, and sustained the tax. And in doing so the court rejected the argument that the commerce clause prohibits a tax laid upon the sale of goods which crossed State boundaries pursuant to contracts which "contemplate or require the transportation of merchandise interstate to the taxing state." 309 U.S. at 53, 84 L. Ed. at 575.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

APPENDIX B

Judgment of the Supreme Court of the State of Illinois

Be It Remembered, that, to-wit: on the 24th day of September 1968, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Federal-Bryant Machinery Company, a corporation (formerly known as Federal Machinery Sales Company), Appellant No. 41176 vs. The Department of Revenue of the State of Illinois, Appellee	Appeal from Circuit Court Cook County 61 C 2277 Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Cook County aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 2nd day of December, 1968.

/s/ Clell L. Woods
Clerk,
Supreme Court of the State of Illinois
(SEAL)

APPENDIX C

Illinois Retailers' Occupation Tax Act

Ill. Rev. Stat. (1953), § 440, et seq. (in pertinent part)

An act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption. [Approved June 28, 1933. L. 1933, p. 924.]

Be it enacted by the people of the state of Illinois, represented in the General Assembly:

440. Terms defined.] § 1. "Sale at retail" means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price shall be deemed to be sales.

"Sale at retail" shall be construed to include any transfer of the ownership of, or title to, tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration.

Sales of tangible personal property, which property as an ingredient or constituent goes into and forms a part of tangible personal property subsequently the subject of a "sale at retail", are not sales at retail as defined in this Act.

"Selling price" or the "amount of sale" means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, services and property of every kind or nature and shall be determined, without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost, or any other expense whatsoever.

"Gross receipts" from the sales of tangible personal property at retail means the total selling price or the amount of such sales. In the case of charge and time sales the amount thereof shall be included only as and when payments are received by the seller.

"Department" means the Department of Revenue.

"Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, or a receiver, executor, trustee, conservator or other representative appointed by order of any court.

The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as engaging in the business of selling such tangible personal property at retail does not constitute engaging in such business. As amended by act approved July 25, 1945. L.1945, p. 1278.

441. Tax imposed on business of selling tangible personal property at retail.] § 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent (3%) of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1941, and two per cent (2%) of ninety eight per cent (98%) of the gross receipts from such sales after June 30, 1941 (.), excluding, however, from said gross receipts, commencing August 1, 1953, the proceeds of such sales to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, and excluding the proceeds of such sales to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the constitution and statutes of the United States,

be made the subject of taxation by this State. As amended by act approved July 13, 1953. L.1953, p.——, S.B.No. 503.

• • •

443. Examination and correction of return—Notice of correction—Evidence—Limitations—Protest and hearing.] § 4. As soon as practicable after any return is filed, the Department shall examine such return and shall correct such return according to its best judgment and information, which return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein. Instead of requiring the person filing such return to file an amended return, the Department may simply notify him of the correction or corrections it has made. Proof of such correction by the Department may be made at any hearing before the Department or in any legal proceeding by a photostatic copy of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. Such photostatic copy shall without further proof, be admitted into evidence before the department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein. If the tax computed upon the basis of the gross receipts as fixed by the department is greater than the amount of tax due under the return as filed the Department shall notify the person filing such return of the deficiency, stating that it proposed to assess the amount due, together with a penalty of 10% thereof: Provided, that if the incorrectness of any return as determined by the Department is due to fraud, said penalty shall be 25% of the tax due. Provided, further, that if the person filing any return shall die or shall become incompetent at any time before the Department issues its notice that it proposes to assess an amount due, such notice shall be issued to the administrator, executor or other legal representative, as such, of such person. Except in case of a fraudulent return, or with the consent of the person to whom the proposed assessment is to be issued, no proposed assessment shall be issued on and after January 1, 1941, covering gross receipts received during

any month or period of time prior to January 1, 1938, and no proposed assessment shall be issued on and after July 1, 1941, covering gross receipts received prior to July 1, 1938, and thereafter no proposed assessment shall be issued on and after each January 1 and July 1 covering gross receipts received during any month or period of time more than three years prior to such January 1 and July 1, respectively: Provided, however, that the foregoing limitations upon the issuance of a proposed assessment shall not apply to the issuance of a proposed assessment with respect to any period of time prior thereto in cases where the Department has, within the period of limitation then provided, notified the person making the return of a proposed assessment even though such return had not been corrected by the Department in the manner required herein prior to the issuance of such notice, but in no case shall the amount of any such proposed assessment for any period otherwise barred by this Act exceed for such period the amount shown in the notice of proposed assessment theretofore issued. If, when a tax or penalty under this Act becomes due and payable, the person alleged to be liable therefor shall be out of the State, the proposed assessment may be issued within the times herein limited, after his coming into or return to the State; and if, after the tax or penalty under this Act becomes due and payable, the person alleged to be liable therefore departs from and remains out of the State, the time of his absence is no part of the time limited for the issuance of the proposed assessment; but the foregoing provisions concerning absence from the State shall not apply to any case in which, at the time when a tax or penalty becomes due under this Act, the person allegedly liable therefor is not a resident of this State.

If such person or legal representative shall within 20 days after notice of such proposed assessment file a protest to said proposed assessment and request a hearing thereon, the Department shall give notice to such person or legal representative of the time and place fixed for such hearing and shall hold a hearing in conformity with the provisions of this Act, and pursuant thereto shall issue to such person

or legal representative a final assessment for the amount found to be due as a result of such hearing.

If a protest to the proposed assessment and a request for a hearing thereon is not filed within 20 days after notice of such proposed assessment, the Department shall issue a final assessment to such person or legal representative, as such. As amended by act approved June 22, 1951. L.1951, p. 459.

* * *

445. Erroneous payment of tax, penalty or interest—Credit or refund.] § 6. If it shall appear, after claim therefor filed with the Department, that an amount of tax or penalty has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, except as hereinafter provided, then the Department shall issue a credit memorandum to the person who made the erroneous payment or, in the event that such person shall have died or become incompetent, to such person's legal representative, as such. The amount of such credit memorandum shall be credited against any tax or penalty due or to become due under this Act from the person who made the erroneous payment. If no tax or penalty is due and no proceeding is pending to determine whether such person is indebted to the Department for tax or penalty or either, the credit memorandum so issued may be assigned and set over by the lawful holder thereof, subject to reasonable rules of the Department, to any other person who is subject to the provisions of this Act, and the amount thereof applied by the Department against any tax or penalty due or to become due under this Act from such assignee. Provided that as to any claim for credit filed with the department on and after January 1, 1940, no amount of tax or penalty erroneously paid (either in total or partial liquidation of a tax or penalty under this Act) prior to January 1, 1937, shall be credited, and as to any such claim filed on and after July 1, 1940, no amount of tax or penalty erroneously paid (either in total or partial liquidation of a tax or penalty under this Act) prior to July 1, 1937, shall be credited, and as to any such claims filed on and after each January 1 and July 1 thereafter no amount of tax or

penalty erroneously paid (either in total or partial liquidation of a tax or penalty under this Act) more than three (3) years prior to such January 1 and July 1, respectively, shall be credited; provided, further, that no claim shall be allowed for any amount paid to the Department, whether paid voluntarily or involuntarily, if paid in total or partial liquidation of an assessment which had become final before the claim for credit to recover the amount so paid is filed with the Department, or if paid in total or partial liquidation of a judgment, order or decree of court; provided further that no credit shall be allowed for any amount paid by or collected from any claimant unless it shall appear (a) that the claimant bore the burden of such amount and has not been relieved thereof nor reimbursed therefor and has not shifted such burden directly or indirectly through inclusion of such amount in the price of the tangible personal property sold by him or in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he or his legal representative may be relieved of the burden of such amount, be reimbursed therefor or may shift the burden thereof; or (b) that he or his legal representative has repaid unconditionally such amount to his vendee (1) who bore the burden thereof and has not shifted such burden directly or indirectly, in any manner whatsoever; (2) who, if he has shifted such burden, has repaid unconditionally such amount to his own vendee; and (3) who is not entitled to receive any reimbursement therefor from any other source than from his vendor, nor to be relieved of such burden in any manner whatsoever. As amended by act approved July 21, 1947. L.1947, p. 1458.

* * *

445a. Claims for credit.] § 6a. Claims for credit shall be prepared and filed upon forms provided by the Department. Each claim shall state: (1) the name and principal business address of the claimant; (2) the period covered by the claim; (3) the total amount of credit claimed, giving in detail the net amount of taxable receipts reported each month of the period covered by the claim; (4) the total amount of tax paid each month; (5) receipts upon which

tax liability is admitted each month; (6) the amount of receipts on which credit is claimed each month; (7) the tax due each month as corrected; (8) the amount of credit claimed each month; (9) reason or reasons why the amount, for which the claim is filed, is alleged to have been paid in error; (10) a list of the evidence (documentary or otherwise) which the claimant has available to establish his compliance with Section 6 as to bearing the burden of the tax for which he seeks credit; (11) monthly payments or parts thereof (if any), included in the claim and paid by the claimant under protest; (12) sufficient information to identify any suit which involves this Act, and to which the claimant is a party, and (13) such other information as the department may reasonably require. Where the claimant is a corporation, the claim filed on behalf of such corporation shall be signed by the president, vice-president, secretary or treasurer or by the properly accredited agent of such corporation.

A claim for credit shall be considered to have been filed with the Department on the date upon which it is received by the Department. Upon receipt of any claim for credit filed under this Act, any officer or employee of the Department, authorized in writing by the Director of Revenue to acknowledge receipt of such claims on behalf of the Department, shall execute on behalf of the Department, and shall deliver or mail to the claimant or his duly authorized agent, a written receipt, acknowledging that the claim has been filed with the Department, describing the claim insufficient detail to identify it and stating the date upon which the claim was received by the Department. Such written receipt shall be prima facie evidence that the Department received the claim described in such receipt and shall be prima facie evidence of the date when such claim was received by the Department. In the absence of such a written receipt, the records of the Department as to when the claim was received by the Department, or as to whether or not the claim was received at all by the Department, shall be deemed to be prima facie correct upon these questions in the event of any dispute between the claimant (or his legal representative) and the Department concerning

these questions. Added by act approved July 21, 1947. L.1947, p. 1458.

* * *

445b. Tentative determination of claim—Notice—Hearing—Review.] § 6b. As soon as practicable after a claim for credit is filed the Department shall examine the same and determine the amount of credit to which the claimant or the taxpayer's legal representative, in the event that the taxpayer shall have died or become incompetent, is entitled and shall, by its Notice of Tentative Determination of Claim, notify the claimant or his legal representative of such determination, which determination shall be prima facie correct. Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a photostatic copy of the Department's record relating thereto, in the name of the Department under the certificate of the Director of Revenue. Such photostatic copy shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the Department's determination, as shown therein. If such claimant, or the legal representative of a deceased or incompetent taxpayer, shall within twenty (20) days after the Department's Notice of Tentative Determination of Claim, file a protest thereto and request a hearing thereon, the Department shall give notice to such claimant, or the legal representative of a deceased or incompetent taxpayer, of the time and place fixed for such hearing, and shall hold a hearing in conformity with the provisions of this Act, and pursuant thereto shall issue its Final Determination of the amount, if any, found to be due as a result of such hearing, to such claimant, or the legal representative of a deceased or incompetent taxpayer. The Department's Final Determination may be reviewed by the proper Circuit or Superior Court, in the same manner, within the same time, upon the same terms and conditions and to the same extent, as provided by Section 12 of this Act. Appeals from final orders or judgments of such courts shall be taken as in said Section 12 is provided. Added by act approved July 21, 1947. L.1947, p. 1458.

445c. Notice of tentative determination becomes final determination, when.] § 6c. If a protest to the Department's Notice of Tentative Determination of Claim is not filed within twenty (20) days and a request for a hearing thereon is not made as provided in Section 6b of this Act, the said Notice shall thereupon become and operate as a Final Determination; and, if the Department's Notice of Tentative Determination, upon becoming a Final Determination, indicates no amount due to the claimant, or, upon issuance of a credit memorandum for the amount, if any, found by the Department to be due, the claim in all its aspects shall be closed and no longer open to protest, hearing, judicial review, or by any other proceeding or action whatever, either before the Department or in any court of this State. Claims for credit hereunder must be filed with an initially determined by the Department, the remedy herein provided being exclusive; and no court shall have jurisdiction to determine the merits of any claim except upon review as provided herein. Added by act approved July 21, 1947. L.1947, p. 1458.

* * *

451. Rules and regulations—Notices—Hearings—Review of administrative decisions—Appeals.] § 12.

* * *

The Circuit or Superior Court of the County wherein the taxpayer has his principal place of business, or of Sangamon County in those cases where the taxpayer does not have his principal place of business in this State, shall have power to review all final administrative decisions of the Department in administering the provisions of this Act.

The provisions of the "Administrative Review Act," approved May 8, 1945, as amended, and the rules adopted pursuant thereto, shall apply to and govern all proceedings for the judicial review of final administrative decisions of the Department hereunder. The term "administrative de-

cision" is defined as in Section 1 of said "Administrative Review Act."

* * *

Appeals from all final orders and judgments entered by the Circuit or Superior Court upon review of the Department's determination in any case shall be taken directly to the Supreme Court by either party to the preceeding, and shall be governed by the rules applicable to civil cases appealed to said Supreme Court. The remedy herein provided for appeal shall be exclusive.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1069

FEDERAL-BRYANT MACHINERY COMPANY,
a corporation, etc.,

Appellant,

vs.

THE DEPARTMENT OF REVENUE OF THE
STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court of Illinois.

MOTION TO AFFIRM

WILLIAM J. SCOTT,
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160 North La Salle Street, Suite 900,
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Counsel for Appellee.

FRANCIS T. CROWE,
Assistant Attorney General,
Of Counsel.

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MOTION TO AFFIRM

The Department of Revenue of the State of Illinois, appellee herein, by William J. Scott, Attorney General of the State of Illinois, moves for an affirmance of the decision of the Supreme Court of the State of Illinois on the ground that it is manifest that the questions on which the decision of the cause depends are wholly factual and are so insubstantial as to not require further argument.

ISSUE PRESENTED

The sole issue is whether in fact the appellant-taxpayer was engaged in making retail sales within the State of Illinois or was acting merely as an agent respective of out-of-State sellers.

STATEMENT OF THE CASE

The Appellant's Statement of the Case needs amplifying to present a clearer picture of the issue presented to and decided by the Illinois Supreme Court. The appellant Federal-Bryant Machinery Company appealed directly to the Illinois Supreme Court from the judgment of the Circuit Court of Cook County, Illinois. That judgment affirmed an administrative determination of the Department of Revenue which was adverse to the appellant with respect to a deficiency assessment under the Retailers' Occupation Tax Act. Federal-Bryant Machinery Company is an Illinois corporation with offices in Chicago, Illinois. It has been the exclusive representative in specified territories of various manufacturers of machine tools whose plants are located out of Illinois and who maintain no inventory in Illinois. Prior to November of 1946, the appellant had bought machine tools from the out-of-State manufacturers it represented and resold them to purchasers in Illinois. The Department of Revenue issued a ruling in September of 1946 with respect to the taxability of agents of manufacturers situated similarly to the appellant. Certain procedures were suggested and the ruling stated that if those procedures were followed it would consider that an agency relationship existed and the transactions would not be subject to the Retailers' Occupation Tax. The agreement between the appellant and the manufacturers was modified to bring the appellant within the provisions

of the Department of Revenue's ruling. The Department of Revenue revoked its 1946 ruling effective April 1, 1951. The deficiency assessment against appellant covered the period from April 1, 1951, to August 31, 1954 inclusive. In 1957 the appellant, at the request of its manufacturers, returned to the practice that had been followed by them prior to November of 1946. In the sales involved in this case, that is between April 1, 1951 and August 31, 1954, appellant's salesmen would prepare and submit to the interested Illinois customer a proposal offering a specific machine to be built by a particular manufacturer at a stated price. The customer would prepare a purchase order based on the proposal, address it to the manufacturer in care of the appellant and mail the order to the appellant. The appellant would check the order for accuracy, copy it, and forward it to the manufacturer. When the machine was built, it would be shipped directly to the customer f.o.b. the manufacturer's plant and the appellant would be billed for the stated retail price less commission. The appellant would bill the customer and would then remit payment to appellant, usually by checks payable to the appellant but occasionally by check payable to the manufacturer. The appellant was required to guarantee the credit of each prospective purchaser whose order it forwarded to the out-of-State manufacturer. If the purchaser did not pay, the appellant was obligated to and did pay the purchase price less commission to the manufacturer.

It is the appellant's contention that the Illinois Retailers' Occupation Tax Act (Ill. Rev. Stat. 1953, Ch. 120, Secs. 440 *et seq.*) as applied to its transactions constitutes an undue burden on interstate commerce and that the statute as applied to the transactions engaged in by the appellant is unconstitutional.

ARGUMENT

THE SOLE ISSUE IS A FACTUAL QUESTION AS TO THE NATURE OF THE APPELLANT'S BUSINESS ACTIVITIES.

We quarrel only with the appellant's assertion that the Illinois Supreme Court misinterpreted the import of this Court's decision in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, *McGoldrick* v. *A. H. DuGrenier, Inc.*, 309 U.S. 70, and *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U.S. 70. As the court below held in *Federal-Bryant Machinery* v. *Dept. of Revenue*, 41 Ill. 2d 64, at p. 68:

> "The ordering and billing procedures employed in these transactions also support the hearing officer's finding that plaintiff was engaged in the business of selling at retail."

Further, the court below disposed of the appellant's contention that since the machinery involved was special order machinery manufactured out of the state whether they were agent or retailer, the State lacked the power to impose the tax. At page 69 of its decision, the court stated:

> "The plaintiff contends that even if, as we have held, the transactions in question were sales by the manufacturer to the plaintiff and resales by the plaintiff to the consumers, imposition of the tax is nevertheless barred by the commerce clause of the constitution of the United States. Its position is that where the only source of supply for goods sold is located outside of the State, the transaction is interstate by necessity rather than by choice, and that a tax measured by gross receipts is therefore invalid. The Court of Appeals of New York did indeed draw such a distinction in *National Cash Register Co.* v. *Taylor*

(1937), 276 N.Y. 208, 11 N.E. 2d 881, 883, *cert. den.* 303 U.S. 656, saying: 'Here, on the contrary, the contract made outside of the state called for the delivery of goods which were manufactured outside of the state and which could not be procured within the state. Interstate commerce was contemplated and required by the contract of sale. The state has no power to impose a tax upon that kind of transaction.'

"That view was the underlying basis for the decisions of the New York courts which were reviewed in *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940), 309 U.S. 33, 84 L. Ed. 565, and in the companion cases of *McGoldrick* v. *Felt & Tarrant Mfg. Co.* and *McGoldrick* v. *A. H. DuGrenier, Inc.*, 309 U.S. 70, 84 L. Ed. 584. In each of these cases the New York courts had held the tax invalid, relying upon the *National Cash Register* case. In each of these cases the Supreme Court of the United States reversed, and sustained the tax. And in doing so the court rejected the argument that the commerce clause prohibits a tax laid upon the sale of goods which crossed State boundaries pursuant to contracts which 'contemplate or require the transportation of merchandise interstate to the taxing state.' 309 U.S. at 53, 84 L. Ed. at 575."

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the decision of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

WILLIAM J. SCOTT,
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160 North La Salle Street, Suite 900,
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Counsel for Appellee:

FRANCIS T. CROWE,
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REME COURT. U. S.

Office-Supreme Court, U.S.
FILED
MAR 15 1969
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THE DEPARTMENT OF REVENUE OF THE
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Appellee.

On Appeal From The Supreme Court Of Illinois.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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The Scheffer Press, Inc.—ANdover 3-6850

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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellee's Motion to Affirm misstates the issue presented by this appeal. The issue is not, as appellee asserts, a factual question whether appellant was merely an agent for out-of-state machinery builders or was engaged in Illinois in making retail sales; that factual issue was conclusively determined adversely to appellant by the court below. The question presented is rather, as originally stated by appellant in its Jurisdictional Statement (pp. 2-3), whether Illinois can constitutionally impose an occupational privilege tax on a local representative for out-of-

state machinery builders, measured by that representative's gross sales of machines, each of which is built only to meet the particular specifications of a local user, is obtainable only from a builder whose plant is located outside Illinois, and, when completed, is shipped directly from the out-of-state builder to the Illinois user, title passing outside Illinois.

Appellee's argument merely sets forth the disposition of this question by the court below; it makes no attempt to refute appellant's showing that the court below misinterpreted and misapplied decisions of this Court and that the constitutional question presented is substantial.

For the reasons stated above and in appellant's Jurisdictional Statement, appellee's Motion to Affirm should be denied, and probable jurisdiction should be noted.

Respectfully submitted,

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Chicago, Illinois 60602
Attorney for Appellant

MARTIN L. BOGOT
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Of Counsel

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

FEDERAL-BRYANT MACHINERY CO. *v.* DEPARTMENT OF REVENUE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 1069. Decided March 24, 1969.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.